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In the Supreme Court of the United States

OCTOBER TERM, 1988

City of Gretna, Louisiana, *et. al*,
Petitioners

versus

Citizens for a Better Gretna, *et.al*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF on Behalf of Petitioners

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MAY IT PLEASE THE COURT

Petitioners, the City of Gretna, et al., present for consideration the following in reply to the brief of the Respondents, Citizens for a Better Gretna, et. al..

BACKGROUND

In their brief in opposition, Respondents portray *Gretna* as just another vote dilution case. They attempt to hide errors of law behind Rule 52(a) of the Federal Rules of Civil Procedure. The issues here are not of facts, but of law. The Supreme Court needs to clarify some issues unresolved in *Thornburg v. Gingles*, especially matters pertaining to the race of candidates.

The City of Gretna has been held to three incorrect and non-existent legal standards: a reincaration of the "intent standard", a race-of-the-candidate litmus test, and a rule of evidence that allows exogenous elections to be introduced as evidence whenever the "intensely local" examination of facts fails to pass the thresholds established by the Supreme Court.

The City of Gretna argues that the appropriate legal standards that need to be applied are found in *Thornburg v. Gingles*, in which there is neither an "intent standard" for judging the *bona fides* of candidates of the white race, nor a race-of-the-candidate litmus test for determining "preferred candidate" status, nor authorization to seek evidence of legally significant racial polarization from surrounding jurisdictions or other branches of government.[1]

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[1] To do so violates Arts I, II, and III of the Constitution.

Thornburg establishes threshold criteria for a finding of vote dilution. The threshold criteria at issue here are two. Petitioners maintain that the Voting Rights Act protects **voters**. Respondents insist that the Voting Rights Act is a "Candidate Protection Act". Petitioners further maintain that the "preferred candidate" of a bloc of voters may be of any race; the test is voter behavior, not skin color. Respondents maintain that only blacks can be considered minority preferred candidates.

Finally, **Thornburg** requires an "intensely local" examination of the "interaction" between local politics and the challenged mechanism. If this evidence fails to show legally significant racial polarization and a pattern of "usual loss" by minority preferred candidates, which was not shown in Gretna, plaintiffs may not roam afield to confect evidence from other jurisdictions or other branches of government.

ARGUMENT

1. *Majority Voting Patterns*

Petitioners have argued, following *Thornburg v. Gingles*, 106 S.Ct. 2752 (1986), that the linchpin of a Section 2 claim is **legally significant** racial polarization — instances in which an electoral mechanism creates a pattern of usual loss for candidates preferred by a compact and cohesive minority. This task must rely on objective factors, including "discrete inquiries into minority and white voting practices." [*Thornburg* at 2796]

Respondents dissent from *Thornburg;* they claim that "it is inappropriate to focus solely upon minority

political cohesion and the motivations behind minority support for candidates."[2] Instead, the analysis should turn upon an inquiry into the majority's voting patterns." [*Brief in Opposition* pp. 33-34.] Respondents advocate, as did the district court, an erroneous focus on white voter behavior in lieu of the "discrete"behavioral analysis of both groups as mandated by the Supreme Court. As the trial court put matters, the "linchpin" of racial polarization is the "unwillingness of a substantial number of the racial majority to vote for any minority race candidate or any candidate identified with minority race interests."[3] This is not consistent with *Thornburg.*

The motivation behind this line of argument is a transparent attempt to get the Supreme Court to retrofit present law — to turn a key threshold factor in *Thornburg,* minority cohesion, into a lever and fulcrum for proportional representation. What is being advanced here is the notion that a black candidate unpopular with whites is entitled to a mechanism assuring election,without regard to the black electorate's view of the matter. That is, the district court and respondents would shift the focus of a Section 2 inquiry from a discrete analysis of majority and minority voting patters into a juxtaposition of majority voters and a candidate of the black race. This is not consistent with *Thornburg.*

There is, as well, no more assured formula for creating racial polarization where none may exist. Respondents would have this Court erect a legal framework that makes the aggravation of racial tensions in

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[2] Petitioners do not assert that one should focus "solely" upon minority political cohesion; nor do petitioners speculate on "motivations behind minority support for candidates."

[3] *Opinion,* p. 53, *Record,* Vol. 1, p. 202.

the self interest of candidates. All one must do is antagonize the majority; racial polarization becomes a self-fulfilling prophecy. This is a tool to bootstrap Section 2 violations in jurisdictions where none exist.[4]

2. *The Gretna Intent Standard* [5]

Another feature of the district court's version of racial polarization is the assertion that "Unless it can be shown that an election occurred in which a white candidate ran on issues strongly affecting the black community and with an open, positive and strong identification with the black community. . . .candidacies of black persons are the proper focus of inquiry concerning the extent to which elections are polarized."[6] Just what does this intent standard imply?

3. *The Burden of Proof Shifted to Defendants*

This legal standard, reincarnating the "intent standard" which the Amended Voting Rights Act rejected, is not only at odds with the Act and *Thornburg*, but also with the Constitution. It is unique in that it shifts the burden of proof to the defendants. It creates a legal presumption that the color of a politician's skin endows her/him with the status of preferred candidate. To overcome this court-imposed racial prejudice established in *Gretna*, candidates of the majority race would face an impossible burden of proof. After winning at the ballot box, such candidates,

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[4] Such bootstrapping was denounced in *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988).

[5] The instant case, at 834 F.2d 496 (5th Cir. 1987), 636 F.Supp., 1113 (E.D.La. 1986).

[6] *Opinion*, p. 53, *Record*, Vol. 1, p. 202.

under *Gretna*, would then be subject to the political double jeopardy of re-waging their election campaigns in courthouses. This means that courts, under the *Gretna* doctrine, would second-guess black voters who supported white candidates. It is, in effect, a form of competency hearing for black voters.

4. *Black Candidates Are Automatically "Black Preferred"*

The 5th Circuit amplified the race-of-candidate *Gretna* doctrine. In reviewing the statistical evidence of racial voting patterns in the City, the panel declined to confront the issue of bivariate ecological regression's less than reliable performance.[7] Instead of taking up the genuine problems — legal, logical, and mathematical — in this measurement scheme, the panel set measurement aside as a relevant objective factor. Instead it advanced the notion that a candidate becomes minority-preferred on the basis of his/her race.[8]

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[7] Plaintiffs' experts, four years after trial, could not agree on a single "bivariate ecological regression" estimate for one election in Gretna. They reported, on the same page, the following estimated pluralities for a single candidate: 70.8%, 70.5%, 65.7%, 65.4%, 64.8%, and 60.0%. Engstrom and McDonald, "Definitions, Measurement, and Statistics: Weeding Wildgen's Thicket," 20 *Urban Lawyer* 181. Using the formula for bivariate ecological regression found in standard treatises, another political scientist arrived at an estimate of 49.5%. Wildgen, "Adding Thornburg To The Thicket", 20 *Urban Lawyer* 162.

[8] The 5th Circuit in *Gretna*, at p. 503, states that, "We consider Jones to be an aldermanic candidate sponsored by Gretna's minority group, because he received a significant portion of the black vote, and *because he is black.*" The court denied preferred candidate status to two other candidates, who outpolled Jones among black voters, solely on the grounds that they were white. *Citizens for A Better Gretna, et. al. v. City of Gretna, et. al.* 834 F.2d 496 (1987). The overwhelming black support that these two white candidates received was not inevitable, as the 5th Circuit said, in light of the multitude of white candidates in the election in question.

What this means is that preferred candidate status, in *Thornburg* treated as a finding of fact, has become a conclusion of law in the 5th Circuit.

5. *Exogenous Elections*

Petitioners point to the findings of both courts below that there was insufficient evidence of legally signigicant racial polarization in Gretna. Two times, at worst, a "black preferred" candidate lost; two times "black preferred" candidates won.[9] This is not a matter of dispute, and that should have ended the matter. Respondents argue that, in the absence of sufficient "intensely local" data, they have the right to introduce what the 5th Circuit calls "exogenous elections," drawn from state or federal contests -- and from other branches of government. Petitioners maintain that this amounts to attainder by consanquinity; and it ignores federalism, separation of powers, and universally accepted rules of evidence[10].

The introduction of exogenous elections levies an impossible, and implausible, burden of proof on local governments. It insists that they defend themselves from the vicissitudes of presidential campaigns or state-level contests. The challenged mechanism here is an at-large electoral scheme for the board of aldermen of a small municipality. It strains credulity to confound the purely municipal spirit of local legislative politics with executive branch issues drawn from nationwide contests or with state or even parish issues.

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[9] *Gretna*, at pp. 502-503.

[10] It is axiomatic that irrelevant evidence cannot be afforded probative value. Petitioners reiterate that the *Thornburg* data base does not include exogenous elections.

The design of the Republic, since the abandonment of the Articles of Confederation, has been premised on notions of a "compound republic."[11] As Hamilton put matters, "It is a known fact in human nature that its affections are commonly weak in proportion to the distance of diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union."[12]

Simply put, issues and personalities vary from one level of government to another. Drawing an analogy from electoral politics in one office to another office is risky political science. If people voted alike from one contest to another, there would be either a Republican Senate or a Democratic President. The fact of the matter is that neither condition prevails. Consequently, where it emerges that "intensely local" examinations of voting patterns do not satisfy threshold criteria, it is contrary to fundamental rules of evidence and the notion of fair play[13] as well as good political science — to scavenge exogenous jurisdictions for convenient evidence. This notion is explicit in the Supreme Court's language in *Thornburg* at p. 2763:

> "In order to answer this question [whether the challenged mechanism deprives plaintiffs of an equal opportunity to participate in the political process and to elect candidates of their choice] a court must assess the impact of the contested

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[11] Hamilton, "Federalist No. 23", in Hamilton, Madison, Jay, *The Federalist Papers*, Clinton Rossiter, ed., (New York: Mentor, 1961), p. 155.

[12] *Ibid.*, Federalist No. 17, p. 119.

[13] There is also inherent here a violation of procedural due process.

> structure or practice on minority electoral opportunities on the basis of objective factors."

It is inescapable logic that there can be no interaction between a challenged mechanism (an at-large aldermanic system) and voting practices in elections involving offices other than those comprising the challenged mechanism. The 11th Circuit, in *Carrollton Branch of NAACP v. Stallings*[14] understands this, and it commented accordingly at p. 2558.[15] The Seventh Circuit agrees, as per *McNeil v. Springfield Park Dist.*, at page 944.[16]

CONCLUSION

Petitioners have conclusively shown that **this is not just another voting rights dispute that can hide behind Rule 52(a)**, and that they are entitled to review on *certiorari* for the following reasons:

1. **Petitioners have been held to wrong legal standards**,first an intent standard which focuses on the imponderable state of mind of white candidates, and the race of candidates as the fundamental determining factors with regard to preferred status.

2. The lower courts erroneously rely on and afford probative value to exogenous elections, and thus distort the scope of evidence examined in *Thornburg*, and also ignore the Constitution. **There is clearly a conflict among the Fifth, Seventh and Eleventh Circuits regarding the probative value of exogenous elections.** This conflict should be

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[14] 829 F.2d 1547 (1987), *cert. den.* 108 S.Ct. 1111 (1988), cited in *Petition for Certiorari* at pp. 18, 20.

[15] See *Petition for Certiorari*, p. 17-18.

[16] Note 4, *supra*.

definitively resolved in conformity with the positions of the Seventh and Eleventh Circuits, as those courts adhere to the scope of evidence relied upon in *Thornburg*.

3. **There is a basic uncertainty among the circuits regarding the issue of race of the candidate** -- an uncertaintly that should be definitively decided in conformity with the colorblind spirit and letter of Section 2, as it pertains to preferred candidates, lest there be established a doctrine of pure proportional representation.[17]

Petitioners reiterate the request in their petition for certiorari and move this Court to grant their petition for the reasons previously set forth.

Respectfully submitted,

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[17] Voting rights plaintiffs have in weak cases such as *Gretna* chosen to ignore, for obvious reasons, the Dole amendment language of Section 2 of the Voting Rights Act which states: "That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Codified at 42 U.S.C., Sec. 1973.

CERTIFICATE OF SERVICE

I hereby certify that I have this ___ day of December, 1988, served two copies of the foregoing reply brief upon the following, by placing same in the United States mail, properly addressed and first class postage prepaid:

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